U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: MAY 31 1989

CASE NO. 88-INA-298

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

IMPELL CORPORATION
Employer

on behalf of

FARIBA RAHNAVARD
Alien

Samuel M. Tidwell & Assoc., P.C.
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; Brenner, Guill, Tureck, and Williams, Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United Stated workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A151), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On September 19, 1986, the Employer, Impell Corporation, filed an application for alien employment certification to enable the Alien, Fariba Rahnavard, to fill the position of structural nuclear design engineer. (A8, A37-A152). The duties of the job were to perform dynamic analysis of nuclear power plant components including technical evaluations of cable tray support behavior under dynamic loads, and to verify technical methods used for qualification of cable tray hangers by comparing the computer analysis results to the actual test results. The Employer required a Master of Science degree in civil engineering and six months experience in the job offered. (A8). The Employer also required that "education or previous experience must include one year of experience with Structural Design Language (STRUDL) a software used in structural design." (A8).

On September 28, 1987, the Certifying Officer issued a Notice of Findings (A34-A36). The CO cited §656.20(c)(8), that the job opportunity must be open to any qualified U.S. worker; §656.21(b)(7) and §656.21(j)(1), that U.S. workers must have been rejected solely for lawful, job-related reasons; and §656.21(b)(6), that the requirements for the job opportunity are the actual minimum requirements, and that the employer has not hired workers with less training or experience, or that it is not feasible to hire workers with less training or experience than that required for this job offer. (A35). The CO found, inter alia, that the Employer had rejected U.S. applicant Paul Lu because he was difficult to understand and unable to express his qualifications in English. According to the CO, Mr. Lu received a M.S. degree from the University of North Dakota, did post-master's study at the University of Utah, has been in the United States since the early sixties, and responded to the CO in fluent English. (A35). The CO concluded that qualified U.S. workers were rejected for other than lawful, job-related reasons. (A36).

On October 30, 1987, the Employer submitted its rebuttal (A16-A33). With regard to applicant Paul Lu, the Employer stated the following:

> Mr. Lu was very concerned about the salary offered. He was unwilling to appear for a personal interview and therefore we were forced to interview him by phone. In the telephone conversation with our recruiter he was unable to recall what types

> of codes he used in designing supports for conduit trays and piping and approximately one third of his explanations could not be understood even after asking him to repeat his answer. He refused to talk about his qualifications and continually referred us to his resume leading us to conclude that he did not understand the question. . . . [O]ur recruiter concluded that Mr. Lu either does not have the qualifications or is incapable of understanding and communicating technical terms in English. Since our employees are required to respond to telephone inquiries from our clients regarding design requirements, we determined that Mr. Lu is not capable of performing the job that is being offered. (A22).

The Employer also submitted the interview notes in support. (A24-A30).

The CO issued a Final Determination on February 9, 1988, denying certification (A12-A15).[2] The CO again cited §656.20(c)(8), §656.21(b)(7), §656.21(j)(1), and §656.21(b)(6). According to the CO, the Employer has not presented a lawful, job-related reason for rejecting applicant, Lu. "In the case of [Mr. Lu], the employer continues to use subjective terms as he seeks to reject [Mr. Lu], who has proved his language skills." The CO found that based on Mr. Lu's educational background, employment history and conversation with the CO, the Employer's statement that Mr. Lu is incapable of understanding English is not true, and that Mr. Lu is capable of performing the job offered. (A14). The CO rejected the Employer's argument that since employees are required to respond to telephone inquiries from clients, Mr. Lu was not qualified. "The employer at this later date cannot state a new requirement not mentioned on the ETA 750 A - form." (A15).

On April 5, 1988, the Employer requested review. (A1). On appeal the Employer stated that Mr. Lu was unwilling to appear for a personal interview, and that he claimed that the salary offered was too low. The Employer argued that Mr. Lu was incapable of discussing technical terms in English and constantly referred the recruiter to the credentials on his resume. The Employer further argued that "communication with potential clients and prospective engineers is an imperative requirement widely recognized among competitors in the engineering services industry. . . To adopt the Certifying Officer's conclusion would require the inclusion of information no matter how obvious or redundant on form ETA 750."

Discussion and Conclusion

The alien labor certification process requires the employer to determine, through its recruitment efforts, whether there is an able, willing, qualified, and available U.S. worker.

---

[2] The CO originally purported to deny certification on Form 7145A "Notice of Findings." (A13). The CO thereafter corrected his error and issued a Form 7145 "Final Determination." The CO also incorrectly stated that Mr. Lee was rejected for unlawful reasons, as opposed to Mr. Lu. (A14). Since the Employer identified the CO's errors, by timely requesting review and arguing on appeal that Mr. Lu was properly rejected, the CO's errors are considered harmless.

Pursuant to §656.21(b)(7), the employer must document that if U.S. workers have applied for the job opportunity, they were rejected solely for lawful, job-related reasons. In the instant case, the Employer has the burden of establishing that U.S. applicant, Paul Lu, was rejected solely for a lawful, job-related reason.

According to the Employer, Mr. Lu stated that the salary offered was too low. The Employer's statement in rebuttal to the Notice of Findings indicates only that Mr. Lu was very concerned about the salary. The Employer has not established that the position was offered to Mr. Lu and that Mr. Lu did not accept the position based on the low salary offered. In re Martinez and Wright Engineering, 88 INA 127 (Oct. 28, 1988). Therefore, the Employer has not established that Mr. Lu was lawfully rejected as not accepting the salary offered.

According to the Employer, Mr. Lu was unable to perform the job duties based on his inability to communicate in English. The CO, however, contacted Mr. Lu and determined that he was able to communicate in English. Faced with the conflict in opinion, the CO properly placed the burden on the Employer in the Notice of Findings to demonstrate that the applicant was not qualified for the position. Weighing the Employer's statements in rebuttal, together with the applicant's education, employment history, time spent in the United States, and conversation with the CO, the CO determined that the Employer had not demonstrated that the applicant was unable to perform the stated job duties of performing dynamic evaluations of nuclear power plants components. Based on the record, we cannot find that the CO erred in his determination.

The Employer has not documented lawful, job-related reasons for rejected each U.S. applicant. Therefore, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

NL:WB